

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HILEBERTO VALTIERRA,

Petitioner,

v.

STEVE SMITH,

Respondent.

Case No. 1:24-cv-00778-HBK (HC)

ORDER FOR CLARIFICATION
REGARDING MIXED PETITION¹

(Doc. No. 1, 4)

Petitioner Hileberto Valtierra (“Petitioner”), a state prisoner proceeding pro se, has pending a petition for writ of habeas corpus under 28 U.S.C. § 2254 that was docketed on July 3, 2024. (Doc. No. 1, “Petition”). Petitioner accompanied his Petition with a “motion to request for stay and abeyance of mixed federal habeas petition.” (Doc. No. 4, “Motion”). On August 21, 2024, Respondent filed an response to the Motion stating opposition to a *Rhines* stay and non-opposition to a *Kelly* stay. Petitioner filed a reply requesting a stay under *Rhines*, or in the alternative, an opportunity to dismiss the entire Petition without prejudice in order for him to fully exhaust his unexhausted claims and re-file a fully exhausted Petition. (Doc. No. 16).

¹ This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 (E.D. Cal. 2022).

For the reasons set forth more fully below, the Court orders clarification from Petitioner as to how he wishes to proceed with his mixed petition at this time.

APPLICABLE LAW AND ANALYSIS

A petitioner in state custody who wishes to proceed on a federal petition for a writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). Exhaustion is a “threshold” matter that must be satisfied before the court can consider the merits of each claim. *Day v. McDonough*, 547 U.S. 198, 205 (2006). The exhaustion doctrine is not a jurisdictional issue but is based on comity to permit the state court the initial opportunity to resolve any alleged constitutional deprivations. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509, 518 (1982). To satisfy the exhaustion requirement, petitioner must provide the highest state court with a full and fair opportunity to consider each claim before presenting it to the federal court. *See O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *Duncan v. Henry*, 513 U.S. 364, 365 (1995). Exhaustion is determined on a claim-by-claim basis. *Insyxieng-May v. Morgan*, 403 F.3d 657, 667 (9th Cir. 2005). And the burden of proving exhaustion rests with the petitioner. *Darr v. Burford*, 339 U.S. 200, 218 (1950) (overruled in part on other grounds by *Fay v. Noia*, 372 U.S. 391 (1963)). A failure to exhaust may only be excused where the petitioner shows that “there is an absence of available State corrective process” or “circumstances exist that render such process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B)(i)-(ii).

Petitioner raises twelve claims in his Petition. (Doc. No. 1). He notes the following grounds for relief are fully exhausted: (1) violation of Petitioner’s constitutional right to public trial; (2) violation of his constitutional right to self-representation; (3) violation of his constitutional right to confrontation; and (4) violation of his constitutional right to “effective cross-examination” because certain evidence was excluded at trial. (*Id.* at 7-13). However, Petitioner acknowledges that the following grounds for relief are not exhausted, and indicates he has pending a petition for writ of habeas corpus in state court in order to fully exhaust these claims of: (5) actual innocence; (6) *Brady* violation as prosecution failed to disclose exculpatory evidence; (7) ineffective assistance of trial counsel; (8) prosecutorial misconduct during closing

1 arguments; (9) trial court error in allowing jury to view “extrinsic evidence” during deliberations;
2 (10) trial court failure to instruct jury on affirmative defense of “unconsciousness”; (11) trial
3 court failure to instruct jury on “involuntary manslaughter”; and (12) denial of access to
4 discovery materials in order to prepare post-conviction petitions. (*Id.* at 14-22).

5 Federal courts cannot consider petitions that contain both exhausted and unexhausted
6 claims, often referred to as “mixed” petitions. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982)
7 (holding a district court must dismiss a federal habeas petition containing both unexhausted and
8 exhausted claims). The filing of a mixed petition renders it subject to dismissal on its face. *Id.* at
9 519. To remedy this problem, a petitioner may, at his option, withdraw the unexhausted claims
10 and go forward only with the exhausted claims. *Anthony v. Cambra*, 236 F.3d 568, 574 (9th Cir.
11 2000) (“district courts must provide habeas litigants with the opportunity to amend their mixed
12 petitions by striking unexhausted claims as an alternative to suffering dismissal.”). Alternatively
13 under certain circumstances and as long as adequately supported, a petitioner may seek leave to
14 amend or to seek a stay and abeyance of the federal habeas action while the petitioner exhausts
15 any unexhausted claims in state court. *See Dixon v. Baker*, 847 F.3d 714, at 719 (9th Cir. 2017)
16 (“we have repeatedly warned the district courts that they ‘may not dismiss a mixed petition
17 without giving the petitioner the opportunity to delete the unexhausted claims This warning is
18 compelled by the fact that, unless either a stay of the habeas proceedings or leave to delete the
19 unexhausted claims is granted, a federal habeas petitioner will lose the opportunity to have his
20 properly exhausted federal claims heard in federal court simply because they were submitted in a
21 mixed petition.”).

22 Two procedures are available to federal habeas petitioners who wish to proceed with
23 exhausted and unexhausted claims for relief: one provided for by *Rhines v. Weber*, 544 U.S. 269
24 (2005), and the other by *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2002). While Respondent did not
25 oppose a stay under *Kelly*, Petitioner has indicated he wishes to pursue a stay under *Rhines*.
26 (Doc. No. 16). Under *Rhines*, stay and abeyance is appropriate if “the petitioner had good cause
27 for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no
28 indication that the petitioner engaged in intentionally dilatory litigation tactics.” *Rhines*, 544 U.S.

1 at 278; *Bolin v. Baker*, 994 F.3d 1154, 1156 (9th Cir. 2021). Respondent argues Petitioner fails to
2 provide any argument or evidence for not having exhausted grounds five through twelve in state
3 court, and therefore has not provided the requisite good cause for his failure to exhaust under
4 *Rhines*. (Doc. No. 9 at 3-4) (citing *Blake v. Baker*, 745 F.3d 977, 982 (9th Cir. 2014) (“While a
5 bald assertion cannot amount to a showing of good cause, a reasonable excuse, supported by
6 evidence to justify a petitioner’s failure to exhaust, will.”)).

7 “There is little authority on what constitutes good cause to excuse a petitioner’s failure to
8 exhaust.” *Blake*, 745 F.3d at 980. Although good cause under *Rhines* does not require a showing
9 of “extraordinary circumstances,” *Jackson v. Roe*, 425 F.3d 654, 661-62 (9th Cir. 2005),
10 “unspecific, unsupported excuses for failing to exhaust—such as unjustified ignorance—[do] not
11 satisfy the good cause requirement,” *Blake*, 745 F.3d at 981. Rather, “good cause turns on
12 whether the petitioner can set forth a reasonable excuse, supported by sufficient evidence, to
13 justify” his failure to exhaust his claims. *Id.* at 982. “An assertion of good cause without
14 evidentiary support will not typically amount to a reasonable excuse justifying a petitioner’s
15 failure to exhaust.” *Id.* Sister courts within our circuit have required, at a minimum, a showing
16 of some “circumstance over which [a petitioner] had little or no control” that prevented him from
17 asserting the unexhausted claim in state court. *Riner v. Crawford*, 415 F. Supp. 2d 1207, 1211
18 (E.D. Nev. 2006); *see Hernandez v. Sullivan*, 397 F. Supp. 2d 1205, 1207 (C.D. Cal. 2005)
19 (adopting the “good cause” standard of procedural defaults in which “a petitioner ordinarily must
20 show that the default resulted from an objective factor external to the petitioner which cannot
21 fairly be attributed to him”).

22 In his reply, Petitioner generally asserts that he “was not in possession of evidence
23 pertaining to the claims until a later time and only learned and/or discovered these claims while
24 investigating the others.” (Doc. No. 16 at 3). However, as noted by Respondent, Petitioner states
25 in the Petition that appellate counsel informed him he would need to file a state habeas petition to
26 pursue grounds five through twelve either because they were outside the record or because his
27 appellate attorney “chose not to raise them” on direct appeal. (*See* Doc. No. 1 at 14-21). Thus,
28 upon cursory review, the Court is inclined to agree with Respondent that Petitioner does not

1 establish good cause for failing to exhaust claims five through twelve, as required to grant a stay
2 under *Rhines*.

3 Also in his reply, Petitioner asks the Court to consider, in the alternative to a *Rhines* stay,
4 a voluntary dismissal of the Petition without prejudice so he may re-file the entire petition after
5 all his claims are exhausted. (Doc. No. 16 at 3). Petitioner calculates “roughly 11 months
6 remaining on his AEDPA time clock.” (*Id.* at 2). The Court makes no comment as to whether
7 this estimate is correct, and cautions Petitioner that while the AEDPA limitations period is tolled
8 while Petitioner has a pending state habeas petition raising the unexhausted claims, the limitations
9 period is not tolled during the time in which his Petition or any other federal habeas petition has
10 been pending in this Court. *See Duncan v. Walker*, 533 U.S. 167, 181-82 (2000). Finally, the
11 Court notes that were Petitioner to voluntarily dismiss the entire Petition, his filing of a new
12 petition after fully exhausting his claims would not be considered second or successive. *See*
13 *Slack v. McDaniel*, 529 U.S. 473, 487 (2000).


14 In light of the foregoing, the Court seeks clarification from Petitioner on how he wishes to
15 proceed on the alternative requests presented in his reply brief.

16 Accordingly, it is **ORDERED**:

17 1. Petitioner must file a Notice as to whether he wishes to (1) proceed with his
18 request for a *Rhines* stay, at which point the undersigned will enter Findings and
19 Recommendations as discussed above, or (2) voluntarily dismiss his entire petition *without*
20 *prejudice* to refiling once his claims are exhausted. Petitioner must deliver this Notice to
21 correctional officials for mailing **no later than December 3, 2024**.

22 2. Petitioner is forewarned that failure to follow this order will result in a
23 recommendation for dismissal of the petition as a mixed petition and/or for failure to prosecute or
24 comply with a court order pursuant to Federal Rule of Civil Procedure 41(b).

25
26 Dated: November 12, 2024

27 
28 HELENA M. BARCH-KUCHTA
UNITED STATES MAGISTRATE JUDGE